

**NO. 42922-5-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHRISTEN WARREN,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**SEAN BRITTAIN  
WSBA # 36804  
Deputy Prosecutor  
for Respondent**

**Hall of Justice  
312 SW First  
Kelso, WA 98626  
(360) 577-3080**

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**I. ISSUE**

1. Was the Appellant denied effective assistance of counsel?
2. Did the trial court err in denying the Appellant's motion for a continuance on the morning of trial?

**II. SHORT ANSWER**

1. **No.** The Appellant was not denied effective assistance of counsel.
2. **No.** The trial court did not err when denying the Appellant's motion for continuance because the trial would not have had a different result.

**III. STATEMENT OF FACTS**

On November 23, 2010, the Cowlitz County Prosecutor's Office filed an information charging Cristen Warren, the Appellant, with Violation of the Uniform Controlled Substances Act – Possession of Diazepam, Possession of Marijuana < 40 grams, and Driving While License Suspended. CP 1-2. The Appellant was formally arraigned and pleaded not guilty on December 8, 2010. The State's plea offer was rejected and a jury trial was set to commence on October 5, 2011. RP 19.

At trial, the State filed a motion in limine to exclude the defense from introducing evidence of other prescription medications. RP 1-2. The Appellant's counsel argued the evidence would be relevant to suggest to the jury that because the Appellant had prescriptions for medications similar to Diazepam, then it was more likely than not that he had a

prescription for Diazepam. RP 2-3. The Appellant's counsel informed the court that the Appellant had produced a receipt for a prescription for Alprazolam, but was unable to locate proof of his prescription for Diazepam. *Id.* The trial court ruled that this evidence was irrelevant and granted the State's motion in limine. RP 5.

The Appellant decided to waive his right to a jury trial and proceed with a stipulated facts trial. RP 9. The trial court granted a recess to allow the State to draft the stipulated facts. RP 10. When court reconvened, the Appellant's counsel made a motion for a continuance, claiming that the Appellant suddenly remembered where he could obtain a copy of his prescription for Diazepam. RP 12-13. In objecting to the motion, the State pointed out that the case had been pending for eleven months and "[i]f he had this information it should have been disclosed and available as of today." *Id.* The court denied the Appellant's motion, concluding that "certainly this is the kind of evidence that would be available throughout that time period." *Id.* Based upon the stipulated facts, the Appellant was convicted. RP 15.

The Appellant's sentencing was set over two weeks to October 19, 2011. RP 15-16. At that hearing, the State requested the court sentence the Appellant. RP 18-19. The Appellant was still unable to produce a proof of a prescription for Diazepam. RP 20. The court allowed the

Appellant four additional weeks to determine if he would qualify for the work release program. RP 25. On November 23, 2011, the Appellant returned to court for his continued sentencing hearing. RP 28. The Appellant still did not have proof of a prescription for Diazepam. RP 30-32. The Appellant was sentenced and the judgment and sentence was entered. RP 34.

#### **IV. ARGUMENT**

##### **I. THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wn. App. 256, 262, (1978); *see also* U.S. Const. Amend. VI, Wash. Const. art. 1, § 22. “[T]he substance of this guarantee is that courts must make ‘effective’ appointments of counsel.” *Jury*, 19 Wn. App. at 262 (quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* (citing *State v. Myers*, 86 Wn.2d 419 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire

record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263.

The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* “A defendant must meet both prongs to satisfy the test.” *State v. Brockob*, 159 Wn.2d 311, 344-45 (2006)

Deference will be given to counsel’s performance in order to “eliminate the distorting effects of hindsight” and the reviewing appellate court must indulge in a strong presumption that counsel’s performance is within the broad range of reasonable professional assistance. *State v. Lopez*, 107 Wn. App. 270, 275 (2001), *aff’d*, 147 Wn.2d 515 (2002). A decision concerning trial strategy or tactics will not establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78 (1996); *State v. Garrett*, 124 Wn.2d 504, 520 (1994); *State v. McFarland*, 127 Wn.2d 322, 335 (1995).

**a. The Appellant cannot show that defense counsel failed to provide effective representation.**

The Appellant argues that because his defense counsel failed to effectively represent him, he was unable to make an informed decision in his case. He supports this claim in two ways. First, he states that his defense counsel failed to adequately communicate with him by claiming that he was never informed that Diazepam is Valium. This argument is unsupported by the record. The Appellant was charged by information with Violation of the Uniform Controlled Substances Act – Possession of Diazepam. CP 1. The information makes no mention of Valium. Therefore, presumably, the Appellant was put on notice that the substance at issue was Diazepam and not Valium. Nothing in the record contradicts this assertion.

On the morning of trial, the Appellant had sought to introduce a copy of a receipt for a prescription medication, Alprazolam.<sup>1</sup> RP 2. The Appellant argues that he thought he had produced the correct prescription because he did not realize that Diazepam was the same thing as Valium. RP 13. This contention simply makes no sense. There is nothing in the record to suggest the Appellant's counsel told him the controlled substance at issue was anything but Diazepam. And yet, at trial, the

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<sup>1</sup> Commonly known as Xanax.



Appellant produced a prescription receipt for Alprazolam, not Diazepam. Whether or not the Appellant's defense counsel informed the Appellant that Diazepam and Valium are the same substance does not change the fact that the Appellant was on notice that the controlled substance at issue was Diazepam.

Second, the Appellant states that his defense counsel failed to properly investigate his case. He contends that either his defense counsel or a hired investigator should have tracked down the prescription the Appellant supposedly had. Clearly this argument is without merit. The Appellant, not the defense counsel, has access to his own medical records, including his prescription medications. The Appellant suggests that due diligence requires his counsel to have his client sign a medical release and call each and every pharmacy in the state of Washington to track down a prescription. Is this what due diligence requires? What if the Appellant had decided to not sign a release and allow his counsel to have access to his medical records? Is defense counsel ineffective when his client cannot or will not work with him in preparing a defense? Or, would it be common sense for a defense counsel to ask his client, who would presumably know where his prescriptions came from or which doctor prescribed them, to obtain a copy of said prescription?

The Appellant was able to secure a receipt for Alprazolam. Nothing in the record suggests he had knowledge that Alprazolam is the same thing as Xanax. Therefore, there is nothing to suggest that the only means of obtaining a copy of a prescription is to be aware of the medication's common name. Presumably, the Appellant simply went to the pharmacy and requested a copy of his prescription. Despite the Appellant's assertions, nothing in the record truly supports his claim that his counsel failed to adequately communicate with him. Furthermore, the Appellant's declaratory statements that the "[h]is attorney did not investigate the defense" are not supported by the record. The record does show that the Appellant's counsel realized the potential defense, a valid prescription, and sought the best possible means to obtain that evidence. The Appellant was aware of the charges, the evidence and the State's offer. The Appellant rejected the State's offer and attempted to introduce evidence of other prescription medications as a defense.

**b. The Appellant cannot show prejudice.**

Even if the Court finds that the Appellant's counsel failed to adequately communicate, the Appellant must then show that he was prejudiced. The Appellant cannot meet this burden. In examining whether the Appellant was prejudice, we simply have to look at the two

sentencing hearings that occurred well after the trial date. On October 19, 2011, two weeks after the trial date, the Appellant appeared with counsel for sentencing. RP 18. At that hearing, the Appellant was unable to produce a prescription for Diazepam. RP 20. Sentencing was continued for four weeks to November 23, 2011. RP 25. At that hearing, six weeks after the date of the trial, and one year after the information was filed, the Appellant could still not produce a prescription for Diazepam. RP 30-32.

The most logical conclusion that can be made from this set of facts is simple: the Appellant does not have a prescription for Diazepam. Can there be prejudice when an individual is not told the common name for a prescription medication when he does not have an actual prescription for that medication? Likewise, is there a failure to investigate when it's obvious that the defense attorney will not locate a prescription that does not exist? Clearly, the Appellant was not prejudiced in any manner. He was unable to produce a prescription because it did not exist. There can be no determination of ineffective assistance of counsel when exculpatory evidence does not actually exist.

## **II. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S REQUEST FOR A CONTINUANCE.**

Generally, the granting or denying of a motion for continuance of the trial of a case...rests within the sound discretion of the trial court, and will not be disturbed absent a showing that the trial court in ruling upon the motion

either failed to exercise its discretion or manifestly abused its discretion.

*State v. Tatum*, 74 Wn. App. 81, 86 (1994) (following *State v. Miles*, 77 Wn.2d 593, 597-98 (1970); *State v. Angulo*, 69 Wn. App. 337, 341 (1993)). Even if an individual claims a deprivation of a constitutional right, “the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.” *Tatum*, 74 Wn. App. at 86 (following *State v. Eller*, 84 Wn.2d 90, 95-96 (1974); *State v. Edwards*, 68 Wn.2d 246, 255 (1966)).

The Appellant cites to six potential factors in arguing that the trial court’s denial of the motion to continue was in error. The Appellant’s argument fails to recognize one key fact: the request for the continuance was based upon the procurement of evidence that did not exist. As stated above, the Appellant was well aware that he was charged with unlawful possession of Diazepam. The court had previously granted four motions for continuances. The case had been pending for eleven months. RP 13. In that entire time frame, the Appellant was only able to obtain a copy of a receipt for a prescription for Alprazolam, not Diazepam. RP 2-3. Six weeks after the trial date, at the second sentencing hearing, the Appellant was still unable to produce a prescription for Diazepam. RP 20, 25.

Simply put, a continuance would not have changed the outcome of the trial. Over that eleven month period, the Appellant clearly demonstrated that he did not have a prescription for Diazepam. This is evident based upon the failure to present it the morning of trial, at the first sentencing hearing held two weeks after the trial date, and at the second sentencing hearing held six weeks later. The Appellant cannot show that the outcome of the trial would have been different because the record is clear. Even if the court had granted the continuance, the Appellant would still have been unable to produce a prescription.

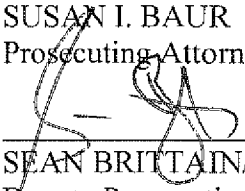
#### **V. CONCLUSION**

As stated above, the Appellant's appeal should be denied. The Appellant was not denied effective assistance of counsel. The Appellant failure to produce evidence of his defense occurred because the evidence did not exist, not because of his counsel's actions. The trial court's denial of the Appellant's motion to continue was not in error because the outcome of the trial would not have been any different than what occurred.

Respectfully submitted this 23 day of July, 2012.

SUSAN I. BAUR  
Prosecuting Attorney

By

  
SEAN BRITTAIN/WSBA# 36804  
Deputy Prosecuting Attorney  
Representing Respondent

### **CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund  
Attorney at Law  
P.O. box 6490  
Olympia, WA 98507  
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 24<sup>th</sup>, 2012.

Michelle Sasser  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**July 24, 2012 - 11:37 AM**

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